No. 86-377

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

ALPHONSO CARVAJAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied the effective assistance of counsel because during petitioner's trial, his attorney was disbarred from practicing in the court of appeals as the result of misconduct in an unrelated case.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A59-A102) is reported at 785 F.2d 682.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1986. A petition for rehearing was denied on July 7, 1986 (Pet. App. A120). The petition for a writ of certiorari was filed on September 5, 1986. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiracy to violate currency reporting laws, in violation of 18 U.S.C. 371; conspiracy to possess, and possession of, cocaine with intent to distribute it, in violation of 21 U.S.C. 841 and 846; interstate travel for the purpose of furthering criminal activity, in violation of 18 U.S.C. 1952; use of a communication facility in connec-

tion with drug trafficking, in violation of 21 U.S.C. 843(b); managing a continuing criminal enterprise, in violation of 21 U.S.C. 848; and racketeering, in violation of 18 U.S.C. 1962(c). Petitioner was sentenced to a total of 29 years' imprisonment and to a lifetime special parole term, and he was fined a total of $175,000. See Pet. App. A54. The court of appeals affirmed.[1]

1. Petitioner's trial commenced on March 8, 1983 (Pet. App. A28). As summarized in the opinion of the court of appeals (*id.* at A61-A63), the government's evidence at trial established that between September 1981 and June 1982, petitioner engaged in narcotics trafficking and laundered the proceeds of illicit narcotics transactions through various California banks. On March 15, 1983, during petitioner's trial, the court of appeals disbarred petitioner's trial attorney from practicing in that court because he had missed filing deadlines, he had failed to prosecute an appeal, and he had tendered a bad check to a court reporter in an unrelated case (*id.* at A65). On March 22, 1983, the trial judge advised petitioner's counsel at sidebar of the March 15 disbarment order and of the district court's local rule regarding disbarment in such circumstances.[2] The judge also stated that petitioner's counsel would be allowed to complete the trial, but that he

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[1] Petitioner's co-defendant was convicted on 19 counts of the indictment. She was also sentenced to 25 years' imprisonment and a lifetime special parole term, and she was fined a total of $1,000,000. See Pet. App. 60a. The court of appeals reversed several of the counts against her on evidentiary grounds. See *id.* at A71, A76.

[2] Local Rule 2.6.2 of the United States District Court for the Central District of California provides (Pet. App. A78):

> Upon receipt of reliable information that a member of the Bar of this Court has been suspended or disbarred from practice by the order of any court or administrative agency, this Court shall immediately impose a like order of suspension or disbarment. The attorney so suspended may make application to the Chief Judge for reinstatement by regularly noticed motion.

should advise petitioner of the court of appeals' disbarment (*id.* at A57):

> All I wanted to do was put on the record that I've discussed this with the Chief Judge of the District Court here, and he believes, like I do, that you should be allowed to complete representation in this case. But I think you are under an obligation to talk to your client about it, to do something about this order if you think it's not proper, the Ninth Circuit order. But if you take a look at [the] Local Rule * * * that says that in effect that if a member of this Bar is disbarred by any other court in which he is admitted, then he automatically is disbarred from practice in this court. If you don't want to suffer that disability, it's your obligation to do something about it. But I wanted to inform you that you better do something about it if you think you have proper grounds.

The district court did not itself inform petitioner of his attorney's disbarment in the court of appeals, and the record does not reveal whether petitioner's attorney informed petitioner of the matter (*id.* at A65).

2. The court of appeals rejected petitioner's claim that his attorney's disbarment by the court of appeals deprived petitioner of his Sixth Amendment right to the effective assistance of counsel (Pet. App. A77-A88). The court deferred to the determination by the trial judge and the chief judge of the district court that the local court rules permitted the postponement of counsel's disbarment in the district court pending completion of the trial (*id.* at A78-A81). The court also held that in any event the disbarment of a previously qualified attorney carries with it no suggestion that the attorney's continued representation is inherently inadequate, and that nothing in the record demonstrates that the ability of petitioner's trial counsel to provide effective representation was impaired following the notice of his disbarment (*id.* at A81-A86). Finally, the

court rejected (*id.* at A87-A88) petitioner's argument that the district court judge created a conflict of interest between petitioner and his trial counsel by not personally informing petitioner of his attorney's disbarment in the court of appeals.[3]

ARGUMENT

1. Petitioner contends (Pet. 8-9) that his representation by an attorney who had been disbarred by the court of appeals constitutes a per se violation of his Sixth Amendment right to the effective assistance of counsel. The court of appeals properly rejected that claim.

Petitioner is wrong in suggesting that the only basis for the court of appeals' decision was its conclusion that a disbarred attorney is able to provide effective assistance of counsel. The court principally relied on its determination that petitioner's trial counsel was *not* disbarred in the district court during petitioner's trial (see Pet. App. A78-A81). Although the local district court rule provides that upon suspension or disbarment from any court or administrative agency, "the [district] court shall immediately impose a like order of suspension or disbarment" (see note 2, *supra*), both the chief judge of the district court and the trial judge construed the local rule to accord them the discretion to determine how and under what circumstances the disbarment should be put into effect, and to suspend such action pending completion of an ongoing trial in

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[3] Judge Ferguson dissented on the ground that the failure of petitioner's trial counsel to inform petitioner that he had been disbarred both revealed the extent of the attorney's conflict of interest and deprived petitioner of his right to determine whether to continue to retain counsel who was suffering from divided loyalties (Pet. App. A93-A99). The dissenting judge also concluded that petitioner's absence from the sidebar conference concerning the court of appeals' disbarment order deprived petitioner of his constitutional right to be present at every critical stage of the trial (*id.* at A99-A101).

which the attorney subject to disbarment was involved. It is undisputed that no formal disbarment order was entered by the district court during the pendency of petitioner's trial. The court of appeals properly deferred to the district court's construction of its own local rule. For that reason, this case does not present the issue whether representation by a disbarred attorney automatically deprives a criminal defendant of his Sixth Amendment right to effective assistance of counsel.

Weighty considerations support the district court's interpretation of its local rule in this case. As the court of appeals noted (Pet. App. A81-A84), representation by a person who has never been admitted to the practice of law is not the equivalent, for Sixth Amendment purposes, of representation by an attorney who has been suspended from practice or whose status as an attorney in good standing is in question at the time of the defendant's trial. The cases upon which petitioner relies for the proposition that representation by a disbarred counsel is automatically ineffective all involve defendants who were unknowingly represented by a person who had never been admitted to practice in any bar. See *Solina* v. *United States,* 709 F.2d 160, 167-169 (2d Cir. 1983); *Harrison* v. *United States,* 387 F.2d 203, 212-213 (D.C. Cir. 1967), rev'd on other grounds, 392 U.S. 219 (1968); see also *Harrison* v. *United States,* 359 F.2d 214, 217 (D.C. Cir. 1965). Where, as in this case, petitioner was represented by an individual who was admitted to the practice of law, but who was subsequently limited in his right to practice in another jurisdiction, the conviction should not be set aside absent a showing of prejudice. *United States* v. *Hoffman,* 733 F.2d 596, 599-601 (9th Cir.), cert. denied, 469 U.S. 1039 (1984); *United States* v. *Costanzo,* 740 F.2d 251, 258-259 (3d Cir. 1984), cert. denied, 472 U.S. 1017 (1985); see also *Derringer* v. *United States,* 441 F.2d 1140, 1141 (8th Cir. 1971) (per curiam); *United States* v. *Bradford,* 238 F.2d 395 (2d Cir.), cert. denied, 352 U.S. 1002 (1956).

In this case, moreover, no prejudice was shown. Counsel's disbarment in the court of appeals was the result of his failure to comply with filing deadlines in an unrelated appeal and other conduct "unbecoming a member of the bar of the court" (Pet. App. A78). As the court of appeals found (*id.* at A85-A86), nothing in the record suggests that either the disbarment or the actions that provoked it adversely affected counsel's performance at trial in this case.[4]

2. There is also no merit to petitioner's claim (Pet. 9-10) that his attorney's disbarment in the court of appeals created a conflict of interest that deprived petitioner of his Sixth Amendment right to conflict-free counsel. Contrary to petitioner's contention, there is no reason to suppose that the disbarment in any way divided his attorney's loyalties. The trial judge assured petitioner's attorney that both the trial judge and the chief judge of the district court had agreed that he would be permitted to complete his representation of petitioner (see Pet. App. A57). Under those circumstances, there is no reason to suppose that petitioner's counsel would have had an incentive to provide less than vigorous representation because he was concerned about the possibility of either immediate disbarment by the district court or termination by petitioner. Moreover, as the court of appeals found (*id.* at A85-A86), petitioner has failed to demonstrate that the disbarment issue had any adverse effect upon his representation at trial.[5]

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[4] Compare *United States* v. *Merritt*, 528 F.2d 650, 651 (7th Cir. 1976) (failure of attorney admitted in sister state to pass state bar coupled with concrete examples of substandard performance at trial indicate failure to meet minimum standard of performance).

[5] Petitioner also maintains (Pet. 10) that the district court's failure to advise petitioner of his attorney's disbarment in the court of appeals and its decision to permit the attorney to proceed violated petitioner's Sixth Amendment right to decide whether to waive the right to effective representation by conflict-free counsel. We do not dispute that the

3. Finally, petitioner claims (Pet. 11-13) that his absence at the sidebar conference concerning his counsel's disbarment in the court of appeals violated his due process right to be present at all stages of the trial. This claim, which turns on the unique factual setting of this case, is insubstantial. A defendant has a due process right to be present at a proceeding when "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder* v. *Massachusetts,* 291 U.S. 97, 105-106 (1934). See *United States* v. *Gagnon,* 470 U.S. 522, 526 (1985) (per curiam). The right to be present does not, however, attach to *ex parte* conferences that are not part of the adjudicatory process and do not implicate the defendant's right to assist in his own defense. See *United States* v. *Gagnon,* 470 U.S. at 526-527; *Rushen* v. *Spain,* 464 U.S. 114, 125-126 (1983) (Stevens, J., concurring); *United States* v. *Watchmaker,* 761 F.2d 1459, 1466 (11th Cir. 1985), cert. denied, No. 85-547 (Jan. 27, 1986); *LaChapelle* v. *Moran,* 699 F.2d 560, 564-567 (1st Cir. 1983).

In this case, the sidebar conference with petitioner's attorney did not involve petitioner's "opportunity to defend against the charge[s]." *Snyder,* 291 U.S. at 105-106. The judge was not performing an adjudicatory function at the conference, nor was he resolving any issue of fact or law. Cf. *LaChapelle* v. *Moran,* 699 F.2d at 565. The judge was merely performing the administrative function of advising petitioner's attorney that he had been disbarred in the court of appeals and explaining that, pending completion of petitioner's trial, the disbarment would not affect his

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trial judge should have personally informed petitioner of the attorney's disbarment in the court of appeals, rather than relying on the attorney to do so. The court's failure to do so, however, did not improperly burden petitioner's right to effective assistance of counsel because, as discussed above, his counsel was not disbarred in the district court during the trial, he did not labor under a conflict of interest, and he provided fully competent representation.

status in the district court. Under these circumstances, the conference did not violate petitioner's due process right to be present at his trial.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1986

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[6] If the trial judge's actions could constitute an error of constitutional dimension, it would be the result of his failure to advise petitioner at any time of counsel's disbarment in the court of appeals, and not that the judge discussed the matter at sidebar in petitioner's absence. As explained above, however, because the disbarment in no way affected the capacity of petitioner's trial attorney to represent petitioner in the district court nor constituted a basis for a claim of inadequate representation, the trial judge's failure did not amount to a "deprivation of a right so essential to the integrity of the process by which [petitioner's] conviction was obtained that it renders void the presumptively valid judgment." See *Rushen* v. *Spain*, 464 U.S. at 128 (Stevens, J., concurring).

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